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71-1707

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ——

IN THE MATTER OF THE APLICATION OF THE COUNTY COLLECTOR OF COOK COUNTY, ILLINOIS, FOR JUDGMENT AND ORDER OF SALE AGAINST REAL ESTATE RETURNED DELINQUENT FOR THE NON-PAYMENT OF GENERAL TAXES FOR THE YEAR 1967, and the COUNTY OF COOK, a body politic and corporate,

(Petitioners).

vs.

NORTHWESTERN UNIVERSITY and DEE-EL GARAGE, INC.,

Objectors (Respondents),

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Petitioners, COUNTY OF COOK, ILLINOIS (acting in behalf of all the people, citizens and taxpayers of Cook County) and the County Collector of Cook County, pray that this Court issue a writ of certiorari to the Supreme Court of Illinois to review a judgment of that court dated March 30, 1972.

OPINION BELOW

The opinion of the Supreme Court, which reversed the holding of the trial court that Northwestern's all-encompassing, perpetual real estate tax exemption was a denial of due process and equal protection to other universities and colleges in the State, appears in Appendix B and is reported in 51 Ill. 2d 131, 281 N.E. 2d 334.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on March 30, 1972. This petition was filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. Par. 1257 (3) and also pursuant to Rule 19 (a) of the Rules of the Supreme Court of the United States and the following cases: *Kassiek* v. *United Fruit Co.*, 365 U.S. 731; *In Re Murchison*, 349 U.S. 133; *United Mine Workers* v. *Illinois State Bar Assoc.*, 389 U.S. 217.

QUESTIONS PRESENTED

I.

Whether the 14th Amendment, by its own force, invalidates a special state tax exemption (granted before adoption of that Amendment) to the extent that the tax exemption violates the due process and equal protection mandates of that Amendment by exempting Northwestern University, even after adoption of that Amendment, from paying taxes on its commercial and industrial property while all other Illinois educational institutions which have not received such special tax exemption do pay such taxes on similar property?

II.

Whether the provisions of the Amending and Supremacy clauses of the United States Constitution (Articles V and VI) are implicit in every contract between a state and its citizens, automatically implementing, as a part of that contract, any subsequent amendments to the Constitution, so that a special exemption from all state taxation granted Northwestern University prior to the adoption of the 14th Amendment is, upon adoption of that amendment, automatically limited to the extent necessary to implement the due process and equal protection mandates of that Amendment, with the result that Northwestern will be required to pay taxes on its industrial and commercial property as are all other Illinois educational institutions which have not been granted such special state tax exemption?

III.

Whether the implicit inclusion of the Amending and Supremacy clauses as a part of every contract between a state and its citizens—making every right granted by such contract susceptible to the defeasance compelled by any subsequent constitutional amendment — prevents Northwestern University from basing its tax exemption on "grandfather clause" principles?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Article I, Section 10 of the United States Constitution:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

2. Article V of the United States Constitution:

> "The Congress, . . . shall propose Amendments to this Constitution . . . which . . . shall be valid to all Intents and Purposes, as Part of this Constitution when notified . . ."

3. Article VI of the United States Constitution:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges of every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

4. 14th Amendment to the United States Constitution:

> " . . . nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

5. The special statute amending Northwestern's corporate charter:

> "That all property, of whatever kind or designation, belonging to or owned by said corporation, shall be forever free from taxation for any and all purposes." Private Laws of Illinois, 1855, p. 483.

6. The special statute requiring Northwestern to adopt and operate in accordance with by-laws provides:

> " . . . provided such by-laws are not inconsistent with the constitution and laws of this State and of the United States . . ." Section 2, An Act to Incorporate Institutions of Higher Learning in Illinois, 1849. Section 1, An Act to Incorporate Northwestern University, 1851.

STATEMENT OF THE CASE

This case illustrates the grave financial problem caused state and local governments by claims of tax exemption by not-for-profit corporations on their properties used and leased for commercial and industrial purposes.

The enormity of the problem on a national scale is demonstrated in "Tax Exempt Property: Crushing Burden for the Cities" by H. B. Meyers, Fortune Magazine, May, 1969, p. 76, and "The Free List" by Alfred Balk, Russell Sage Foundation, 1971.

Thus here, Respondent Northwestern University (hereinafter, Northwestern) has, for more than a century, paid no real estate taxes whatsoever on any of its immensely valuable properties in Cook County, Illinois, which it has leased to others for commercial and industrial use. A listing of these properties, ranging from a Pepsi-Cola bottling plant to a private golf club, is contained in Appendix A, which was contained in Petitioners' brief filed in the Supreme Court of Illinois.

Northwestern's corporate charter was amended in 1855 to provide:

> "That all property, of whatever kind or designation, belonging to or owned by said corporation, shall

be forever free from taxation for any and all purposes." Private Laws of Illinois, 1855, p. 483

Notwithstanding the Illinois Constitution of 1870, Northwestern claims its properties leased for commercial and industrial purposes are exempt from taxation. That Constitution prohibited the legislature from granting to any corporation any special privilege (Art. IV, sec. 22); and, with respect to exemption from taxation, provided that such "property as may be used exclusively for • • • school • • • purposes, may be exempted from taxation; but such exemption shall be only by general law." (Art. IX, sec. 3.) By general law the legislature exempted only that property of schools which was used exclusively for school purposes, and not leased or otherwise used with a view to profit.

Educational institutions established subsequent to 1870 therefore do not enjoy the same kind of tax exemption claimed by Northwestern University.

The University of Chicago, Loyola University (chartered before the 1870 Illinois Constitution), DePaul University and Mundelein College, for example, all pay taxes on property they own which is leased for commercial and industrial purposes even though their revenues, like Northwestern's, are used for the purpose of promoting their educational objectives. Property owned by Northwestern University leased and operated for commercial and industrial purposes, however, has been held tax exempt by the Illinois Supreme Court decision in this case.

This inequality of tax treatment, anomalous in current Illinois tax law and practice, originated in the 1850's. The General Assembly, in 1849, passed "an Act to Incorporate Institutions of Higher Learning in Illinois" which provided for the establishment of private colleges.

That legislation was general law, applicable to all institutions seeking the right from the State to organize and operate for the purpose of offering higher education in Illinois. In 1851, the General Assembly granted Northwestern University its charter to operate pursuant to the provisions of the Act of 1849 aforesaid.

Northwestern was organized under the sponsorship and operated under the control of the Methodist Episcopal Church.[1] Both the general enabling Act of 1849 and the specific incorporating Act of 1851 contain the express provision that the University shall adopt and operate in accordance with By-laws:

> ". . . provided such by-laws are not inconsistent with the constitution and laws of this State and of the United States . . ."[2]

The Illinois Revenue Act of 1853 (Public Laws, 1853, p. 1) provided that real estate owned by educational institutions was tax exempt only when the property was used for school purposes. That statute was passed by the General Assembly pursuant to the Illinois Constitution of 1848 which authorized the legislature to grant tax exemptions to charitable and educational institutions. (Article IX, Sect. 3, Illinois Constitution of 1848).

In 1855 the General Assembly by Special Act, amended Northwestern's original 1851 Charter and granted the tax exemption mentioned above.

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[1] Section 1 of its charter provides that the University's Trustees shall be composed of appointees of the Rock River, Wisconsin, Michigan, North Indiana, Iowa and Illinois Annual Conferences of the Methodist Episcopal Church.

[2] Section 2, An Act to Incorporate Institutions of Higher Learning in Illinois, 1849. Section 1, An Act to Incorporate Northwestern University, 1851.

In 1868, the Fourteenth Amendment to the United States Constitution was adopted. Section 1 of that Amendment provides that ". . . no state shall pass any law abridging the privileges and immunities of citizens . . . nor [deny any person] . . . equal protection of the laws or due process of law . . ."

Between 1843 and 1869 the Illinois General Assembly granted special tax exemptions to about 152 institutions, including Northwestern University. These institutions received exemptions of variegated terms, durations and scope.[3] Defying any rational classification, these exemptions were granted to numerous types of institutions ranging from Insane Asylums and Seminaries to Bible Societies and Astronomical Societies; these exemptions vary in character and scope ranging from Northwestern's perpetual total grant, to Quincy College's grant limited to 5 acres of land, the Old Ladies Home of Chicago limited to $50,000 and the Henry Female Seminary in Marshall County limited to 5 acres of land.

The inequality produced by the arbitrary legislation granting these exemptions, based on the variety in character of their recipients, obviously was not directed exclusively towards the promotion of educational institutions in early Illinois history. No definitive classification can be drawn or recognized from the activity of the legislature or scattered objects of its largess.

Knox College was founded in 1837; Illinois Wesleyan University was founded in 1853; Loyola University was founded in 1870; the University of Chicago was founded in 1892; DePaul University was founded in 1898 and Roosevelt University was founded in 1946. None of these

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[3] A partial list of these exemptions and their basic terms is included in Appendix C.

schools shares the tax exempt status of Northwestern University. All of these schools are required to contribute to the burden of services provided by local government by paying taxes on their property not used for school purposes.

The tax revenues of Cook County are derived principally from real estate taxation. There are approximately 954 square miles in Cook County. Northwestern University in its original charter is limited to owning 2000 acres of land, with certain exceptions which could raise that figure.

The Central Business District in the City of Chicago consists of about one square mile, or 0.446% of the total area of the City of Chicago and only .10% of Cook County's total area. However, the Central Business District provides approximately 16.4% of all real estate tax revenue in the City of Chicago and 9.8% in the entire Cook County.[4]

Considering that one square mile equals 640 acres, Northwestern University's 2000 acre limitation would then equal 3.12 square miles, or three times the size of the Central Business District of Chicago. If Northwestern fully utilized the allotment granted by the legislature (which it claims it has the right to do) it could remove from the tax rolls by selective purchase of prime properties approximately 25% or $125,000,000.00 in real estate tax collections.

Northwestern University follows a policy of purchasing land in Cook County and leasing it for profit to commercial and industrial entities.[5] This policy was initiated soon after beginning operation, by one of its founders. A prime

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[4] Report of the Central Business District of Chicago Committee, 1970, pg. 1 (the "Central Business District" is geographically defined as the area bounded by Wacker Drive on the North and West and Congress Street on the South).

[5] A Pictorial History of Northwestern University, 1951, p. 16–17.

site which the University proudly points to as one leaf in its investment portfolio is the Northeast corner of Jackson Boulevard and LaSalle Street in downtown Chicago, on which stands the Continental Illinois National Bank and Trust Company of Chicago, one of the largest banking institutions in the country.

At least 71 acres of Northwestern's real estate is leased for profit. However, that 71 acres includes choice land. Some lessees of Northwestern include Illinois Bell Telephone Co., Pepsi Cola Bottling Co., and the First National Bank of Evanston.

Northwestern University owns the real estate located at 29 West Monroe Street in the heart of downtown Chicago. On the premises of approximately 100 feet frontage is located Dee-El Garage, Inc., a multi-level, commercially operated, parking facility which services the various surrounding businesses, State Street merchants, including Carson, Pirie, Scott & Co., the Palmer House, the Shubert Theatre, and the First National Bank and Amalgamated Bank, all within a half block of the garage.

For the tax year 1967, the County Assessor assessed a tax on the property to which Northwestern University, as owner, objected, along with its Lessee, Dee-El Garage, Inc., in a joint objection filed by the same attorney on behalf of both Lessor and Lessee.

In the objection proceedings Northwestern asserted as the basis for its freedom from taxation the exemption granted to the institution by the Legislature in 1855. The University further asserted in the trial court that Dee-El Garage shared its exemption and was likewise exempt from taxation. Dee-El Garage, the Lessee, in the same document asserted as the basis for its freedom from tax liability the exemption of Northwestern University, its Lessor.

At the close of Objectors' evidence, the County of Cook on its own behalf, and as parens patriae for the People of Cook County, moved for and was granted leave, without objection, to intervene as a party to the proceeding. The County Collector of Cook County and Cook County thereafter introduced certain documents and stipulated facts for the record. They then presented their motion to dismiss the Objection, requesting the court to declare unconstitutional, based on the equal protection and due process clause of the Fourteenth Amendment, Northwestern's 1855 exemption as construed and applied to this commercial real estate.

The trial court granted the Petitioners' motion, declaring the exemption unconstitutional, and confirmed imposition of the tax on the fee holder, Northwestern University.

The Supreme Court of Illinois, by its final judgment of March 30, 1972, reversed the trial court and held that, despite the Fourteenth Amendment, Northwestern's exemption from taxation on such commercially leased property was not unconstitutional.

REASONS FOR GRANTING THE WRIT

ARTICLES V AND VI OF THE FEDERAL CONSTITUTION AND THE 14TH AMENDMENT INVALIDATE NORTHWESTERN'S TAX EXEMPTION INSOFAR AS IT APPLIES TO NORTHWESTERN'S PROPERTY USED AND LEASED FOR COMMERCIAL AND INDUSTRIAL PURPOSES.

Northwestern's 1855 tax exemption was a contract with the State. By operation of law—adoption of the 14th Amendment—as well as by that contract's own terms, it became inoperative insofar as it applied to tax exemption of Northwestern's property used and leased for commercial and industrial purposes after that Amendment was adopted.

This conclusion is inescapable because adoption of the 14th Amendment automatically made its dual mandates of due process and equal protection of law applicable to every contract then existing between every State and any of its citizens. Those constitutional requirements would be read into and made a part of old contracts; and, all new contracts (i.e., those drawn after adoption of that Amendment) would have to comply with its demands. Only such equal application to all contracts with the State, regardless of when such contracts were executed, would implement Articles V and VI of the United States Constitution. Evaluated by those imperative constitutional standards, Northwestern's tax exemption must be declared violative of the 14th Amendment.

1.

The Express Language of Northwestern's 1855 Charter Tax Exemption.

Northwestern was granted its Charter by a Special Act approved January 28, 1851. The general statute then in effect was "An Act for the Incorporation of Institutions of earning," approved January 26, 1849. Laws, 1849, p. 86 of Section II.

Section 2 of the 1849 Act provided that corporate institutions of learning had the power "to make and alter from time to time such by-laws *not inconsistent* with *the Constitution* of this State and the *United States* as they may deem necessary for the government of said institutions..." (emphasis added). Failure to so comply with the Federal Constitution subjected the corporate charter to forfeiture.

Section 1 of Northwestern's Charter of 1851 likewise expressly recognizes in substantially identical language the sovereign and binding nature of the Federal constitution upon the State and its creations. Section 1 of the Charter, in authorizing Northwestern to make and alter its by-laws from time to time, qualifies such right:

> "Provided such by-laws are not inconsistent with the Constitution and Laws of this State and of the United States."

Four years after Northwestern's Charter was granted, the Illinois Legislature passed an Amendment to the Charter by a Special Act approved February 14, 1855, which is entitled "An Act to Amend an Act entitled 'An Act to Incorporate the Northwestern University' Approved January 28, 1851." This Amendment provided for the tax exemption now in issue. Nothing contained in this Amendment purported to change the basic policy of the 1849 gen-

eral statute or the Charter itself. On the contrary, the express intent of the Legislature as evinced in the 1849 Act, and in its granting of the Charter and the tax exemption in the amended Charter, as well as in Northwestern's acceptance thereof, was that Northwestern should enjoy no special benefits which would be inconsistent with the laws and constitutions of this State or the United States.

The use of the words "from time to time" and "at any time" in Section 2 of the 1849 Act and in Section 9 of Northwestern's charter clearly establish that the prohibitions against violating the United States Constitution apply to *future* Amendments to that Constitution.

This construction necessary follows from Articles V and VI of the United States Constitution, both of which were in existence and controlling at the time Northwestern's 1855 charter tax exemption was granted. Article V provides for future amendments to the Constitution and Article VI, the Supremacy Clause, provides that:

> "This Constitution, and the Laws of the the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges of every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

These Articles are explicit mandates in the Federal-State relationship of our Union. The State of Illinois was bound by them. As the Supreme Court of the United States held in Testa v. Katt, 330 U.S. 386, 391:

> "It's teaching is that the Constitution and the laws passed pursuant to it are the supreme law of the land, binding alike upon States, Courts and the people, 'anything in the Constitution or Laws of any State to the contrary notwithstanding'."

Therefore, at the time Northwestern was granted its tax exemption both Northwestern and the Illinois legislature were on constitutional notice that the Federal Constitution could thereafter be amended under Article V, and that any such future Amendments would bind the State and void all pre-existing state legislation inconsistent with the national public policy implemented by such Amendments under the Supremacy Clause. (National Prohibition Cases, 253 U.S. 350; Johnson v. State (Florida), 89 So. 114, 116).

Thus, the foregoing express language referring to the Constitution of the United States, appearing in the General Act of 1849 and in Northwestern's charter, constitutes a constitutionally compelled reservation of power by the State to require that the special tax treatment of Northwestern shall always conform to the United States Constitution as amended "from time to time." This means that, upon its adoption, the equal protection of law mandate of the 14th Amendment governs the validity of Northwestern's tax exemption. Therefore that exemption must be invalidated to the extent it applies to Northwestern's property used and leased for commercial and industrial purposes since other Illinois educational institutions do not enjoy the same "equal protection" of such special tax treatment.

The same result would follow by Operation of Law, even if no express language referring to the United States Constitution were contained in the general 1849 Act or in Northwestern's charter.

2.

Operation of Law.

Although this is a case of first impression, there is ample authority to invalidate Northwestern's tax exemption with

respect to commercial and industrial properties by virtue of the impact of the 14th Amendment's regulating all contracts between every State and its citizens.

Pennsylvania v. Board of Trusts, 353 U.S. 230 (1956), involved the will of Stephen Girard, probated in 1831. In the will a trust was created giving a fund to the City of Philadelphia for the erection and operation of a college for poor white male orphans. The college was established immediately and excluded Negroes for more than a century.

Even though the will was probated and the college was established pursuant to the trust prior to the adoption of the Fourteenth Amendment in 1868, this Court, in reversing the Pennsylvania Supreme Court, held that the Fourteenth Amendment governed the trust and that this Amendment was violated by the college's refusal to admit Negro boys.

In Kaukauna Water Power Co. v. Green Bay and Mississippi Canal Co., 142 U.S. 254, a State statute enacted in 1848 provided for the taking of land and riparian rights needed for a public dam and water power without compensation being paid to the landowner. This Court held that actions taken pursuant to the 1848 Wisconsin statute *after* the adoption of the Fourteenth Amendment in 1868 came within the Amendment's requirement that compensation for the taking be paid so as to afford due process of law, even though such actions would not have violated the Constitution of the United States if they had been taken *prior* to the adoption of the Fourteenth Amendment.

At pages 269, 270 and 271, the Court held:

"It is argued by the defendant in error that, inasmuch as the act of the legislature complained of was

> enacted in 1848, and the Fourteenth Amendment to the Constitution was not adopted until 1868, the provision of the latter against the 'depriving' a person of property without due process of law has no application to this case.
>
> There are several answers made by the plaintiff in error to this contention: First, It was not the act itself which deprived the Water Power Company of its property, but the proceedings taken under the act, and *so far as such proceedings were taken subsequent to the constitutional amendment, they fall within its inhibition . . .*'' (Emphasis added.)

In Kaukauna Co., the State statute itself was not governed at the time of its enactment by the requirements of the Fourteenth Amendment inasmuch as the latter had not been adopted. After the adoption of the Fourteenth Amendment, however, actions seeking to derive the benefits of the state statute by taking property without compensation were held to be governed by the Fourteenth Amendment. This case stands squarely for the proposition that the Fourteenth Amendment, upon its adoption — that is, by operation of law, governed rights sought to be fixed by a state statute enacted *prior* to the adoption of that Amendment.

Likewise, in the instant case, Northwestern's tax exemption, having been enacted by the Legislature prior to the adoption of the Fourteenth Amendment, was not governed at its inception by the Amendment. However, Northwestern's non-payment of taxes pursuant to its assertion of its statutory tax exemption in each tax year *subsequent to the adoption of the Fourteenth Amendment* is action occurring after the adoption of the Fourteenth Amendment which seeks to derive the benefits of its original statutory exemption, and is, therefore, subject to the proscriptions of that Amendment, as in the Kaukauna Co. case.

Similarly, in the National Prohibition Cases, 253 U.S. 350 (1919), the plaintiff contended that the Eighteenth Amendment, which prohibited the sale, use or transportation of alcoholic beverages, did not apply to whiskey he owned *prior* to the adoption of said Amendment. He further contended that he would be deprived of property without just compensation in violation of the Fourteenth Amendment inasmuch as the whiskey would have no value. (pages 360, 361). Nevertheless, in disregarding this contention, this Court held at page 386 that:

> "The first section of the Amendment — the one embodying the prohibition — is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, *and of its own force invalidates every legislative act* — whether by Congress, by a state legislature, or by a territorial assembly — *which authorizes or sanctions what the section prohibits.*" (Emphasis added.)

The Court further held at page 387:

> "That power (18th Amendment) may be exerted against the disposal for beverage purposes of liquors manufactured *before* the Amendment became effective just as it may be against subsequent manufacture for those purposes. In either case it is a constitutional mandate or prohibition which is being enforced." (Emphasis added.)

The foregoing decisions clearly establish that an Amendment to the United States Constitution by its own force invalidates every state statute which authorizes or sanctions what the Amendment prohibits — even property or contract rights which were obtained under State statute prior to the adoption of the Amendment and which in the absence of such Amendment would be clearly enforceable.

These decisions implement the mandates of Articles V and VI of the United States Constitution. Accordingly, the power of the Illinois Legislature to grant a tax exemption to Northwestern was circumscribed by these Federal Constitutional Articles. In fact, as we have observed above under sub-point 1, the express language of Northwestern's charter, and of the general 1849 statute under which it was granted, both recognized the potentially invalidating force of Articles V and VI of the U.S. Constitution, even though those Articles would be read into Northwestern's contract by operation of law.

Also, in Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 692, this Court held with reference to the Contracts Clause of the Federal Constitution:

> "But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, whenever a necessity for their execution shall occur."

The Illinois Legislature's power to grant a tax exemption to Northwestern, being subordinated to Articles V and VI of the Federal Constitution, said exemption was necessarily, from its inception, subject to a condition subsequent which would make the contract inoperative thereafter to the extent the exemption should become repugnant to any future Amendment to the Federal Constitu-

tion, including the Fourteenth Amendment. This conclusion is inescapable.

Each year's taxes gives rise to a new cause of action. Turn Verein Lincoln v. Paschen, 20 Ill. 2d 229; People v. University of Illinois, 357 Ill. 369. When this cause of action arose for the 1967 taxes involved herein, the Fourteenth Amendment was in effect and governed the cause of action. As the United States Supreme Court held in Neal v. Delaware, 103 U.S. 370, 389:

> "Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution, or render it inoperative, that provision which restricts the right of suffrage to the white race. Thenceforward, the statute which prescribed the qualifications of jurors was, itself, enlarged in its operation, so as to embrace all who by the State Constitution, as modified by the supreme law of the land, were qualified to vote at a general election."

Likewise, by 1967 the Fourteenth Amendment, as the supreme law of the land, had itself made invalid that portion of the statute granting Northwestern's tax exemption which was repugnant to that Amendment: that is, tax exemption for all properties owned by Northwestern and used by it for commercial or industrial purposes or leased to others for commercial or industrial uses.

The preferential tax treatment asserted by Northwestern with respect to its vast commercial and industrial properties is clearly barred by the 14th Amendment condition subsequent constitutionally compelled to be read into its contract with the State.

As the Court held in Neal v. Delaware, 103 U.S. 370, 389:

> "The presumption should be indulged, in the first instance, that the State recognizes, as is its *plain duty*, an amendment of the Federal Constitution, from *the time of its adoption*, as binding on all its citizens and

every department of its government, and to be enforced, within its limits, without reference to any inconsistent provisions in its own Constitution or statutes." (Emphasis added.)

Such preferential tax exemption results in flagrant, invidious discrimination as against other institutions of learning in this State not enjoying similar preferential tax exemption. Thereby, the Equal Protection Clause of the Fourteenth Amendment is clearly violated.

Since the tax revenues of Cook County are principally derived from real estate taxation, the withdrawal of Northwestern's commercially and industrially operated properties from the tax rolls directly results in a deprivation of due process of law and a taking of the property of nonexempt taxpayers without compensation.

3.

The Equal Protection And Due Process Clauses Of The 14th Amendment Preclude The Contract Clause From Validating Northwestern University's Exemption From Taxation On Its Properties Used And Leased For Commercial And Industrial Purposes.

Northwestern, relying on University v. People, 99 U. S. 309 (1878); In re Northwestern University, 206 Ill. 64 (1903) and Northwestern University v. Hanberg, 237 Ill. 185 (1908), contends that the limitation upon its tax exemption sought by Petitioners is barred by the Contract Clause of Article I of the Constitution of the United States.

In University v. People, 99 U.S. 309 (1878), the Supreme Court of the United States held, in sustaining the validity of Northwestern's tax exemption, that the charter was a contract between Northwestern and the State

of Illinois which, under the Contracts Clause of the Federal Constitution, could not be impaired by State action. The sole basis for the decision was this Court's comparison of the Illinois Constitutions of 1848 and 1870, and its conclusion, contrary to the Illinois Supreme Court, that the 1848 Constitution permitted the State to grant the exemption while the Constitution of 1870 did not. Nowhere in the opinions of either Court was any reference whatsoever made to the Fourteenth Amendment of the Federal Constitution. That case did not adjudicate the claim now being made by Petitioners concerning the applicability and the effect of the Fourteenth Amendment upon Northwestern's tax exemption, which is the basic issue presented by this case.

Likewise, in In re Northwestern University, 206 Ill. 64 (1903), and Northwestern University v. Hanberg, 237 Ill. 185 (1908), the Fourteenth Amendment was not raised as an issue. Those cases merely followed University v. People, supra, and construed the 1855 exemption as encompassing real estate owned and acquired by Northwestern both prior and subsequent to 1855.[6]

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6. Accordingly, no res judicata or estoppel prevents Petitioners from raising the constitutional issues herein which were never raised or decided in prior litigation.

In repeated decisions by this Court, and by the Illinois Supreme Court, causes of action for taxes in different years are held to be an exception to the general rule of non-tax litigation that res judicata and estoppel apply to all issues which were raised, or could have been raised, in the first suit between the same parties. In Keokuk & W.R. Co. v. State of Missouri, 152 U.S. 301, the State of Missouri sued the defendant railroad for taxes for the use of a county. The Court held that a prior judgment in an action for taxes for one year (on the ground that the property was exempt) was not a bar to a suit for taxes for a subsequent year on the same property when new issues are involved.

The decisions of the Illinois Supreme Court are to the same effect: The People v. The University of Illinois, 357 Ill. 369 at 371-2; Turn Verein Lincoln v. Paschen, 20 Ill. 2d 229.

The Illinois Supreme Court, in its judgment of March 30, 1972, herein appealed from, did not consider Petitioners' constitutional contentions herein as being barred by res judicata or estoppel.

A.

There Is No Conflict Herein Between The Fourteenth Amendment And The Contracts Clause.

As demonstrated above, the 1855 tax exemption granted Northwestern by the State was subject to Articles V and VI of the Federal Constitution and therefore was further subject from its inception, both by operation of law and by its express terms, to defeasance and nullification to the extent that it subsequently should become repugnant to the Fourteenth Amendment upon the latter's adoption. Accordingly, the contract itself, arising out of the 1855 tax exemption, gave Northwestern no right to be so exempt if such grant violated the Fourteenth Amendment. The Contracts Clause does not expand rights given by a State to an individual; it merely protects them from subsequent abrogation by the State. Here there is no impairment by the State. Rather, both Northwestern (by accepting the grant) and the State (by the very language it used in granting Northwestern's charter, requiring it to adhere to the provisions of the Federal Constitution) must each necessarily be presumed to have recognized that neither party could make a contract that would not be subject to or limited by some future Amendment to the Federal Constitution.

B.

The Contracts Clause Applies Only To State Legislative Action And Not To Amendments To The Federal Constitution.

Article I, Section 10 provides that:

> "No *State* shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." (Emphasis added)

In New Orleans Water Works Co. v. Louisiana Sugar Refining Co., 125 U.S. 18, 30, this Court held:

> "In order to come within the provisions of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State . . ." See also Ross v. Oregon, 227 U.S. 150, 162.

In New York v. United States, 257 U.S. 591, 600, 601, this Court held:

> "The next objection is that the State has a charter contract with the New York Central Railroad Company by which the latter is bound not to charge more than two cents a mile for passenger carriage between Albany and Buffalo, and that, if the Transportation Act permits the Interstate Commerce Commission by such an order to enable the railroad company to violate its contract, it impairs the obligation of a contract in violation of Section 10, Article I, of the Federal Constitution. That section provides that 'no State shall . . . pass any . . . law impairing the obligations of contracts' and does not in terms restrict Congress or the United States." See also: Sinking Fund Cases, 99 U.S. 700; Thorpe v. Housing Authority, 393 U.S. 268, 278.

The nullification of Northwestern's exemption, upon adoption of the Fourteenth Amendment, to the extent said exemption was repugnant to the Fourteenth Amendment, *was caused not by State action but by the impact of the sovereign force of the United States Constitution.*

When the 1870 Illinois Constitution was adopted, and the general revenue statute was enacted pursuant thereto, the effect thereof was to tax all universities equally,

thus ending the inequity of Northwestern's being exempt from taxation. The State must be presumed to have been acting thereby, not in a manner repugnant to the Federal Constitution as prohibited by the Contracts Clause, but rather under the duty of conforming to the Fourteenth Amendment which had just been adopted in 1868. The 1870 Illinois Constitutional provision and the Revenue Act, thus, were in a constitutional sense *involuntary* acts of the State *compelled* by the Supremacy Clause of the Federal Constitution.

As this Court held in Neal v. Delaware, 103 U.S. 370, 389:

> "The presumption should be indulged, in the first instance, that the State recognizes, as is its *plain duty,* an amendment of the Federal Constitution, from *the time of its adoption,* as binding on all its citizens and every department of its government, and to be enforced, within its limits, *without reference to any inconsistent provisions in its own Constitution or statutes.*" (Emphasis added)

In deciding University v. People, 99 U.S. 309 (1878), this Court did not have before it the issue of "duty" of the State to make its 1870 Constitution, and the general revenue act passed pursuant thereto, comply with the Fourteenth Amendment. Accordingly, its decision in that case that the 1870 Constitution and said revenue act impaired the obligation of Northwestern's contract is not controlling upon the instant case.

When the State is performing its Federal Constitutional duty, the Contracts Clause cannot conceivably bar such lawful action.

C.

The Contracts Clause Cannot Bar Invalidation Of Northwestern's Tax Exemption Insofar As It Violates The 14th Amendment.

Northwestern contended in the courts below, that the Contract Clause prevails over the Fourteenth Amendment, without citing any authority. That the converse is true appears from the decisions of this Court and of those State Supreme Courts which have decided analogous issues. (As noted above, on the facts of this case, there is no conflict between the Contract Clause and the 14th Amendment.)

In Prout v. Starr, 188 U.S. 537, 543 this Court held, in an action instituted against a state official, that the Eleventh Amendment (immunizing States from suits) did not preclude a decision as to whether the provisions of the Fourteenth Amendment had been violated by state actions:

> *"Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutory provisions of the Fourteenth Amendment have been disregarded by state enactments."* (Emphasis added)

So, too, in the instant case, the Contracts Clause cannot be asserted as "an invincible barrier" to consideration of the applicability and effect of the Fourteenth Amendment upon Northwestern's 1855 tax exemption.

The prohibition of the Contracts Clause "is not an absolute one and is not to be read with literal exactness like a mathematical formula." Home Building & Loan Assoc. v. Blaisdell, 290 U.S. 398, 428.

Further, as the latest expression of the will of the People, a constitutional amendment will prevail over a

prior provision of the original constitution or a prior amendment inconsistent therewith. Williams v. Magma Copper Co., 425 P. 2d 138, 140 (Ariz.); Sharpe v. Oklahoma Bar Association, 448 P. 2d 301, 306 (Okla.); Farrar v. Bd. of Trustees, 243 S.W. 2d 688, 692 (Tex.); Kemp v. City of Baton Rouge, 40 So. 2d 477, 482 (La.); Thoman v. City of Lansing, 24 N.W. 2d 213, 215 (Mich.).

This rule of law is succinctly stated in Johnson v. State, 89 So. 114, 116, wherein the Supreme Court of Florida held:

> "The Eighteenth Amendment, being the paramount law of the United States and of the states on the subjects covered by it, *supersedes or restrains the operation of all provisions of the federal constitution and of the amendments thereto* insofar as such provisions are in conflict with the commands of the latest amendment." (Emphasis added)

The Fourteenth Amendment, having been adopted subsequent to the Contracts Clause and manifesting the latest expression of the will of the people, must necessarily prevail over the Contracts Clause if there were, in fact, a conflict between the two Amendments. However, as shown above under the facts of this case, there is no such conflict here.

Finally, Seton Hall College v. Village of South Orange, 242 U.S. 100 (1916), decided after University v. People, 99 U.S. 309, is also dispositive of this case.

In Seton Hall College, the College was incorporated in 1861. Nine years later, it was granted a legislative tax exemption by the New Jersey Legislature. No taxes were assessed against its property until 1911, forty-one years after its tax exemption had been granted. The taxes were assessed under a general taxing statute passed in 1903

repealing all special tax exemption statutes. This statute was passed pursuant to an 1875 amendment to the State Constitution providing that property should be assessed for taxation under general laws and uniform rules, according to its true value.

This Court held, notwithstanding the passage of forty-one years between the granting of the tax exemption and the assertion of the tax, that the original charter, under the State Act pursuant to which the exemption was granted, was subject to repeal at the discretion of the legislature. Therefore, the university was held to be taxable under the 1903 repealing Act pursuant to the 1875 Amendment to the State Constitution, notwithstanding the Contracts Clause of the Federal Constitution.

This Court distinguished University v. People, 99 U.S. 309, on the basis that Northwestern's Charter was not subject to the power of the State to repeal it. This Court, however, in deciding University v. People, did not have before it the issue of the impact of the Fourteenth Amendment as this Court does here. Nor was that issue raised in the Seton Hall case.

While the 1849 Illinois Statute and Northwestern's charter did not expressly reserve the power of the State to amend or repeal the charter at the Legislature's discretion, they did by their express language, and also by operation of law, reserve to the State the power to limit Northwestern's tax exemption whenever it became repugnant to the Federal Constitution. This reservation of power in the State, as we have heretofore observed, was required to be exercised by the Federal Constitution and therefore was an even more solemn and important "repealing" condition in the contract between the State and Northwestern than the repealing reservation of power

by the State relied upon by this Court in Seton Hall. As in the latter case, the Contracts Clause of the Federal Constitution is no bar to limiting the exemption of Northwestern.

4.

Northwestern University's Claimed Exemption From Taxation Of Its Property Used And Leased For Commercial And Industrial Purposes Cannot Be Validated On "Grandfather Clause" Principles As Attempted By The Supreme Court Of Illinois.

The Illinois Supreme Court by its judgment of March 30, 1972 (Appendix B) seeks to justify Northwestern University's tax exemption on the ground that Northwestern was a member of a distinct class and thus has a "grandfather clause" right. That court's opinion relies upon a citation that such a "legislative classification will not be set aside if any set of facts rationally justifying it is demonstrated to or perceived by the courts," citing *Stanley* v. *Public Utilities Commission,* 295 U.S. 76, 79.

That decision and others cited in the Illinois Supreme Court opinion are not applicable. Articles V and VI of the Federal Constitution (the Amending and Supremacy Clauses) are an implicit part of every contract between a state and its citizens. From the inception of such a contract every right granted thereunder is subject to the defeasance or limitation compelled by a subsequent amendment to the Federal Constitution. Thus, Northwestern had no "vested" rights at the time the 14th Amendment was adopted comparable to those affording the basis of the "grandfather clause" decisions. Therefore, the facts of this case make that doctrine wholly irrelevant here.

Northwestern had no "grandfather clause" rights even in the sense used by the Illinois Supreme Court in its March 30, 1972 opinion. In Illinois there never has been a general statute creating a class of universities exempt from taxation of its properties leased and used for industrial or commercial purposes. On the contrary, the Illinois Revenue Act of 1853 provided that real estate owned by educational institutions was tax exempt only when such property was *used* for school purposes. Recognizing that it had no "grandfather clause" rights, Northwestern procured passage of special legislation in 1855 amending its charter to provide tax exemption of its property. Therefore, these facts alone conclusively show that there is no "grandfather clause" rights involved.

There cannot even be a "grandfather clause" classification unless prior to enactment of the 1870 Illinois Constitution there was in existence in Illinois a group of universities or higher educational institutions classified as such on a reasonable basis and each enjoying identical tax exemption privileges. Instead, prior to 1870, such institutions were accorded different and arbitrary tax treatment by the Illinois legislature. For example:

a) some institutions received no tax exemption but were subject to the general Revenue Act which provided real estate tax exemption only on property not sold, leased or used for profit;

b) some institutions were accorded tax exemption with varying dollar limitations;

c) some institutions were accorded tax exemptions with varying acreage limitations;

d) some institutions were accorded tax exemption on their property so long as it was owned and occupied by them for school or institutional purposes.

Those varying and arbitrary exemptions (detailed in Appendix C) were prescribed by separate, special statutes enacted by the Illinois legislature. Thus, the attempted justification of Northwestern's claim made by the Illinois Supreme Court on the basis of a rational "grandfather clause" classification is an error of law readily perceived by examining Appendix C. Because of its constitutional dimension, this error is subject to review by this court.

Moreover, a decision of this court proves that, prior to 1870, all higher educational institutions were not accorded the same, preferential tax treatment Northwestern received from the legislature. In *Chicago Theological Seminary* v. *Gage,* 188 U.S. 662, this court held that a seminary, which had been chartered prior to the 1870 Illinois constitution, did not have an exemption from real estate taxes on land it used for commercial or industrial purposes.

In this case, consequently, since there never has been any reasonable classification of university or higher educational institutions whose members have been accorded idential tax exemption provisions, Northwestern's claim cannot be justified on "grandfather clause" principles.

The Fourteenth Amendment was adopted to establish and implement a national policy of equal treatment under the law to correct such existing inequities and to prevent their perpetuation.

That constitutional protection is what Petitioners seek for the people of Cook County.

CONCLUSION

For the reasons stated herein, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners,
The County of Cook,
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JAMES A. ROONEY,
Special Assistant State's Attorney,
Of Counsel.

APPENDIX A

Lessee	Address of Lessee	Assessor's* Valuation	Equalized Valuation	Annual Real Estate Tax Bill
	Chicago			
Del Farm Food Company	6330 Martin Luther King Drive	$ 128,087.	$ 203,658.	$ 14,032.04
Illinois Bell	8700 South Constance	$ 346,818.	$ 551,441.	$ 38,115.60
Wilson and Company	1800 West 43rd Street	$ 378,855.	$ 602,379.	$ 41,503.92
Pepsi Cola Bottlers	600-658 W. 51st Street	$ 869,902.	$ 1,383,144.	$ 95,298.62
Illinois Bell	2300 West 63rd Street	$ 96,489.	$ 153,418.	$ 10,570.50
American Hospital Association	840 Lake Shore Drive	$ 847,023.		$ 92,792.24
Booth Fisheries	121 West Kinzie	$ 122,665.	$ 195,037.	$ 13,438.04
American Graphic Corporation	601 North Fairbank	$ 342,752.	$ 544,976.	$ 37,548.84
Continental Illinois National Bank	120 Jackson Boulevard	$7,350,214.	$11,686,840.	$805,223.28
Midland Metal Products	2309 South Archer	$ 90,214.	$ 143,440.	$ 9,883.02
Mid America Company	2309 South Archer	$ 51,551.	$ 81,966.	$ 5,647.46
	Evanston			
Devine & Holden	1915 Orrington	$ 221,020.	$ 351,422.	$ 26,911.90
Devine & Holden	1915 Orrington	$ 11,656.	$ 18,533.	$ 1,419.26
Devine & Holden	1915 Orrington	$ 6,809.	$ 10,826.	$ 829.06

Lessee	Address of Lessee	Assessor's* Valuation	Equalized Valuation	Annual Real Estate Tax Bill
	Chicago			
George Lurie	120 S. LaSalle Street	$ 358,437.	$ 569,915.	$ 43,644.10
	Evanston			
Larry Peterson	1304 Chicago Avenue	$ 131,626.	$ 209,285.	$ 16,027.04
	Chicago			
Commonwealth Edison	72 West Adams	$ 97,749.	$ 155,421.	$ 11,902.14
The Kroger Company	208 S. LaSalle Street	$ 115,580.	$ 183,772.	$ 14,073.26
	Evanston			
The Bank Plaza Limited	1603 Orrington	$ 62,427.	$ 99,259.	$ 7,601.26
State National Bank	1603 Orrington	$ 240,864.	$ 382,974.	$ 29,328.14
	Chicago			
Greenleaf Realty Management	63 East Adams	$ 463,812.	$ 737,461.	$ 56,474.76
McGuire and Orr First National Bank and Trust Company, Trust No. 1209		$ 135,015.	$ 214,674.	$ 16,439.74
	Evanston			
McGuire and Orr	1525 Chicago Avenue	44,730.	$ 71,121.	$ 5,446.44
Evanston Sales Company, Inc.	618 Davis Street	$ 99,996.	$ 158,994.	$ 12,175.76
Peacock Dairy Bar	624½ Davis Street	$ 86,692.	$ 137,840.	$ 10,555.78
Chandlers, Incorporated	630 Davis Street	$ 329,410.	$ 523,762.	$ 40,109.70
Quinlan and Tyson	1571 Sherman	$ 257,145.	$ 408,861.	$ 31,310.58

Lessee	Address of Lessee	Assessor's* Valuation	Equalized Valuation	Annual Real Estate Tax Bill
Quinlan and Tyson	1571 Sherman	$ 257,145.	$ 408,861.	$ 31,310.58
Quinlan and Tyson	1571 Sherman	$ 68,287.	$ 108,576.	$ 8,314.76
Quinlan and Tyson	1571 Sherman	$ 745,012.	$ 1,184,569.	$ 90,714.30
Quinlan and Tyson	1571 Sherman	$ 131,625.	$ 209,284.	$ 16,026.96
Richard Slotlow	1430 Sheridan Road	$ 14,954.	$ 23,777.	$ 1,820.84
First National Bank	204 Lake Street	$ 19,799.	$ 31,480.	$ 2,410.74
	Glenview			
Blarius and Peterson	1040 Kenilworth	$ 14,489.	$ 23,038.	$ 1,764.26
	Glenview			
Blarius and Peterson	1040 Kenilworth	$ 39,752.	$ 63,206.	$ 4,840.32
	Evanston			
Foster Crampton	1122 Hinman	$ 13,190.	$ 20,972.	$ 1,606.04
Harold Open	824 Noyes	$ 29,638.	$ 47,124.	$ 3,608.76
Inland Supply Company	815 Maple	$ 32,978.	$ 52,435.	$ 4,015.48
	River Grove			
Phillips Petroleum	8224 West Grand	$ 14,365.	$ 22,840.	$ 1,120.98
	Franklin Park			
Goodbrand Building Corp.	10701 Belmont Avenue	$ 621,430.	$ 988,074.	$ 56,458.54
	Park Ridge			
Phillips Petroleum	Southwest Corners of Touhy and Dee Road	$ 20,886.	$ 33,209.	$ 2,451.48

Lessee	Address of Lessee	Assessor's* Valuation	Equalized Valuation	Annual Real Estate Tax Bill
	Wilmette			
Stanley Najdowski	718 Illinois Road	$ 148,632.	$ 236,325.	$ 18,126.12
	Lincolnwood			
Phillips Petroleum Company	Touhy and Lowell Ave.	$ 12,116.	$ 19,264.	$ 1,028.32
	Skokie			
Phillips Petroleum Company	Skokie-Niles Center	$ 19,098.	$ 30,366.	$ 2,237.98
	Wilmette			
Stanley Najdowski				
Wilmette Golf Club	Lake and Harms Road	$ 54,302.	$ 86,340.	$ 6,803.60
Stanley A. Najdowski	Lake and Harms Road	$ 69,630.	$ 110,712.	$ 8,724.10
	Chicago			
American Hospital Association	840 N. Lake Shore Drive	$2,317,671.	$ 3,685,097.	$253,903.18

* N.B. Assessed valuation does not necessarily reflect market value.

APPENDIX B

(No. 44412.—Reversed and remanded.)

THE PEOPLE *ex rel.* THE COUNTY COLLECTOR OF COOK COUNTY, Appellee, v. NORTHWESTERN UNIVERSITY, Appellant.

Opinion filed March 30, 1972.

Appeal from the Circuit Court of Cook County; the Hon. HELEN F. McGILLICUDDY, Judge presiding.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

This case presents another attack upon the provision of Northwestern University's 1851 corporate charter, as amended in 1855, which grants it exemption from property taxes. That provision states: "That all property, of whatever kind or description, belonging to or owned by said corporation, shall be forever free from taxation for any and all purposes." Private Laws of 1855, p. 483.

The results of the first two attacks upon the charter were thus succinctly described in the opinion of this court disposing of the third attack:

"That this amendment was a contract between the State and the university whose obligation could not be impaired by subsequent legislation imposing taxes upon the property of the corporation, was decided by the Supreme Court of the United States in the case of *Northwestern University* v. *People,* 99 U.S. 309 [1878], reversing the decision of this court in the same case. (80 Ill. 333.) Many years later the board of assessors of Cook County assessed certain real estate of the university for taxation, and it was sought to sustain the assessment on the ground that, the real estate having been acquired

prior to the passage of the amendment to the charter, the exemption therein granted did not apply to it. This contention was overruled, and it was decided that the amendment clearly exempted from taxation all the property of the corporation acquired prior to the amendment. *In re Northwestern University* [1903], 206 Ill. 64." *Northwestern University* v. *Hanberg* (1908), 237 Ill. 185, 188.

The third attack was based upon the assertion that the 1855 amendment to the charter did not apply to any property acquired by the corporation after the amendment. This claim, too, was rejected in 1908. 237 Ill. 188.

No further attack was made upon the charter provision until the property involved in this case, which is owned by Northwestern University and leased to Dee-El Garage, Inc., was assessed for taxation for the year 1967. The property, which is improved with a parking garage, is operated by the lessee, and the income received by the university has been used solely for the educational purposes set forth in its charter. The circuit court of Cook County overruled the objection filed by the university, held the charter exemption void, and entered judgment of sale. The university has appealed.

The first contention advanced in support of the present attack upon the validity of the exemption is that by reason of its express terms the charter did not constitute a contract within the meaning of section 10 of article I of the constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts. The provision of the charter relied upon to support this contention is that which authorizes the university "to make and alter from time to time such by-laws as they may deem necessary for the government of said institution, its officers and servants, provided such

by-laws are not inconsistent with the constitution and laws of this State and of the United States ***." It is contended that the references to the altering of bylaws "from time to time," together with the requirement that the bylaws must be consistent with the constitution of Illinois and of the United States, constituted an express condition subsequent, the effect of which was to make inoperative the tax-exemption provision of the charter to the extent that it should become repugnant to any future amendment to the Federal constitution. In a similar vein, it is argued that the charter must be construed, by operation of law, to include a provision invalidating the tax-exemption provision to the extent that it should violate any future constitutional provision.

Both of these contentions are efforts to read into the charter itself some self-defeating ingredient, and thereby to escape the impact of the clause of the Federal constitution which prohibits the impairment of contracts. It is clear that the first contention, which refers to the bylaws of the corporation, has nothing to do with the validity of the tax exemption. And so far as we are able to understand the second contention, it adds nothing to the attack otherwise made upon the validity of the tax exemption under the equal-protection clause of the fourteenth amendment to the constitution of the United States. We therefore turn to a consideration of that matter.

It is argued that the charter tax exemption deprives other colleges and universities, which do not have similar exemptions, of the equal protection of the law and therefore violates the fourteenth amendment. Viewed from today's perspective, the charter tax exemption of Northwestern University is highly unusual. But as of the date when the tax exemption was enacted as a means of

inducing donations to the institution, the tax exemption was not at all unusual. The public interest in higher education was recognized in the early days of the State, but at that time the recognition took the form of special charters authorizing the incorporation of particular educational institutions. The charters contained tax exemptions, the terms of which varied, apparently in accordance with the inducement thought necessary to bring about contributions to establish and maintain the institutions. Some of the variations are set forth in this court's opinion in *People ex rel. Gill* v. *Lake Forest University* (1937), 367 Ill. 103.

Prior to the adoption of the constitution of 1870, a large number of corporate charters had been granted by the legislature to private educational institutions. There were more than 80 such charters which contained some provision for tax exemption. Ouly a relatively small number of these institutions have survived. Whether the demise of the others was due to the inadequacy of the inducement offered by way of tax exemption or to other causes is unimportant in connection with the determination of this case. The purpose of the tax exemptions was, of course, to bring about the donation of money or property to the institutions.

With the adoption of the constitution of 1870 the situation changed dramatically. That constitution prohibited the legislature from granting to any corporation any special privilege (art. IV. sec. 22), and with respect to exemption from taxation provided that such "property as may be used exclusively for *** school *** purposes, may be exempted from taxation; but such exemption shall be only by general law." (Art. IX, sec. 3.) And by general law the legislature exempted only that property of schools

which was used exclusively for school purposes, and not leased or otherwise used with a view to profit.

Educational institutions established subsequent to 1870 therefore do not enjoy the same kind of tax exemption that is enjoyed by Northwestern University. That fact, however, does not impair the validity of Northwestern's charter provision. As this court stated in 1908: "The changed conditions with which the university is now surrounded cannot affect the meaning of the amendment passed in 1855. Doubtless the legislature did not foresee the enormous growth of the city of Chicago, the increase in the value of property, the growth in the wealth, and the work, the wants and necessities of the university. The university was not then regarded as an incubus on the community. Schools of higher learning were scarce, and the legislature which granted this exemption to Northwestern University granted to various other schools perpetual exemption from taxation of all the property they should ever acquire. (Private Laws of 1855, pp. 380, 384, 503, 511, 513.) Even now the legislature appropriates yearly for the University of Illinois, from money raised by taxation, sums vastly greater than those released to the Northwestern University through this exemption." *Northwestern University* v. *Hanberg* (1908), 237 Ill. 185, 191-2.

In our opinion Northwestern's charter tax exemption does not, as the trial court held, violate the equal-protection clause of the fourteenth amendment by arbitrarily discriminating against other educational institutions whose exemptions from taxation are not so broad. The contract with the State affords a rational, indeed a constitutionally required, distinction between the university and other institutions. The different tax exemption accorded institutions organized after the adoption of the Constitu-

tion of 1870 does not alter the situation. "The fact that Congress enacts a statute containing a 'grandfather clause,' which exempts from the general income tax certain corporations organized prior to a specified date, does not of itself indicate that Congress has made an arbitrary classification. *** Normally a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts. *** Just as a State may provide that after a specified date newly established common carriers must obtain state approval before entering into business so as to prevent proliferation of such carriers and excessive use of the State's highways, see *Stanley* v. *Public Utilities Comm'n* [295 U.S. 76, 79 L. Ed. 1311, 55 S. Ct. 628 (1935)], similarly Congress does not exceed its power to tax nor does it violate the Fifth Amendment when it refuses to exempt from tax newly formed corporations, the multiplication of which might burden otherwise valid federal programs." *United States* v. *Maryland Savings-Share Insurance Corp.* (1970), 400 U.S. 4, 6-7, 27 L. Ed. 2d 4, 7-8, 91 S. Ct. 16. See also *Dandridge* v. *Williams* (1970), 397 U.S. 471, 25 L. Ed. 2d 491, 90 S. Ct. 1153.

Nor is the university's charter tax exemption invalid because it violates the rights of other taxpayers under the due-process and equal-protection clauses of the fourteenth amendment by increasing their taxes, as the trial court also held. This proposition, if accepted, would invalidate all exemptions, for all of them, to a greater or lesser degree, transfer the burden of taxation to others.

The judgment of the circuit court of Cook County is reversed, and the cause is remanded with directions to sustain Northwestern's objection.

Reversed and remanded, with directions.

APPENDIX C

A. Some institutions received no charter tax exemptions and were subject to the general Revenue Act which provided for real estate tax exemption for institutions of learning only on property not sold, leased or used with a view to profit, Pub. Laws 1853, p. 1. Among the institutions falling in this category are Illinois Wesleyan University, Pr. Laws 1853, p. 325; Illinois State University, Pr. Laws 1853, p. 425 (which was to be operated under the auspices of the Evangelical Lutheran Church); The Sullivan Academy, Pr. Laws 1835, p. 459; The Alton Hibernian Benevolent Society, Pr. Laws 1835, p. 518; Knoxville College, Pr. Laws 1835, p. 553; Knox County Manual Labor College, Pr. Laws 1851, p. 38 (amending its charter of February 15, 1837); Astoria Seminary, Pr. Laws 1851, p. 171; Farmers College, Pr. Laws 1851, p. 181; Paris Male and Female Seminary, Pr. Laws 1851, p. 211; Fayette County Seminary, Pr. Laws 1851, p. 235; Shurleff College, Pr. Laws 1851, p. 250 (amending the 1835 charter of Alton College, Laws 1835, 2nd Session, 9th General Assembly p. 181), and Judson College, Pr. Laws 1851, p. 299.

B. Some institutions of learning and also charitable institutions had provisions contained in their statutory charter limiting the tax exemption to property not exceeding a certain dollar value. The following are examples of such limitations:

> The Villa Ridge Lyceum & Library Association, Pr. Laws 1869, Vol. 2, p. 672—$5,000.00; The United Hebrew Relief Association of Chicago, Pr. Laws 1867, Vol. 1, p. 130—$20,000.00; The Kankakee Male & Female Seminary, Pr. Laws 1867, Vol. 1, p. 25—$20,000.00; McDonough Normal & Scientific College, Pr. Laws 1867, Vol. 1, p. 18—$20,000.00; Aledo Col-

legiate Institute, Pr. Laws 1857, p. 1010—$25,000.00 (exclusive of buildings); Charleston Academy, Pr. Laws 1859, p. 360—$25,000.00 (in personal property); Bloomingdale Academy, Pr. Laws 1861, p. 11—$25,000.00; El Paso Academy, Pr. Laws 1861, p. 14—$25,000.00 (in personal property); Woodstock University, Pr. Laws 1861, p. 26—$25,000.00; The Springfield Home for the Friendless, Pr. Laws 1863, p. 27—$25,000.00; Washington Seminary, Pr. Laws 1865, Vol. 1, p. 32—$25,000.00; Quincy Independent German School Association, Pr. Laws 1865, Vol. 1, p. 35—$25,000.00; The Edgar Collegiate Institute, Pr. Laws 1867, Vol. 1, p. 36—$25,000.00; The Rock Island German & English School Society, Pr. Laws 1867, Vol. 3, p. 77—$25,000.00; The Adelphian Literary Society of the Town of Carbondale, Pr. Laws 1869, Vol. 2, p. 674—$25,000.00; The Evangelical Lutheran Synod of Missouri, Ohio and other states, Pr. Laws 1867, Vol. 1, p. 242—$30,000.00; Ministerial Education Society of the Methodist Episcopal Church, Pr. Laws 1861, p. 50—$50,000.00; Roman Catholic Asylum of the Diocese of the Catholic Bishop of Chicago, Pr. Laws 1863, p. 25—$50,000.00; Augustana College and Seminary, Pr. Laws 1865, Vol. 1, p. 21—$50,000.00; St. Lukes Hospital of Chicago, Pr. Laws 1865, Vol. 1, p. 91—$50,000.00; The Evanston Academy, Pr. Laws 1867, Vol. 1, p. 16— $50,000.00; DeWitt County Seminary, Pr. Laws 1867, Vol. 1, p. 37—$50,000.00; The Sisters of the Good Shepherd of the City of Chicago, Pr. Laws 1867, Vol. 1, p. 152—$50,000.00; Fowler Female Institute, Pr. Laws 1857, p. 353—$50,000.00; Ewing Female University, Pr. Laws 1859, p. 363—$50,000.00; Old Ladies Home of Chicago, Illinois, Pr. Laws 1865, Vol. 1, p. 76—$50,000.00; The Union Academy of Sparta, Pr. Laws 1855, p. 373—$100,000.00; Waukegan Academy, Pr. Laws 1857, p. 1381—$100,000.00; Mattoon College, Pr. Laws 1863, p. 15—$100,000.00; Westfield College, Pr. Laws 1865, Vol. 1, p. 17—$100,000.00; Peoria German School Association, Pr. Laws 1865, Vol. 1, p. 36—$100,000.00; Chi-

cago Nursery & Half Orphan Asylum, Pr. Laws 1865, Vol. 1, p. 84—$100,000.00; Henry Female Seminary, Pr. Laws 1857, p. 1063—$100,000.00; Redemptorist Fathers of Chicago, Pr. Laws 1865, Vol. 1, p. 88—$100,000.00; United Presbyterian Theological Seminary of the Northwest, Pr. Laws 1867, Vol. 1, p. 20—$100,000.00; Alexian Brothers of Chicago, Pr. Laws 1869, Vol. 2, p. 675—$100,000.00; Mattoon Female Seminary, Pr. Laws 1863, p. 12—$150,000.00.

C. Some institutions of learning and also many charitable institutions had limitation contained in their statutory charter as to the amount of real estate that could be exempt. Examples are as follows:

Charleston Academy, Pr. Laws 1859, p. 360—40 acres; Galena Classical Institute, Pr. Laws 1859, p. 366—80 acres; The Olney Male and Female College, Pr. Laws 1859, p. 371—10 acres; ElPaso Academy, Pr. Laws 1861, p. 14—40 acres; Illinois Conference Female Academy, Pr. Laws 1846, p. 52—5 acres; The Virginia Seminary of the Cumberland Presbyterian Church, Pub. Laws 1852, p. 26—20 acres; Batavia Institute, Pr. Laws 1853, p. 509—40 acres; LeRoy Seminary, Pr. Laws 1853, p. 547—10 acres; Illinois Military Institute, Pr. Laws 1855, p. 509—20 acres; Hedding Seminary and Central Illinois Female College, Pr. Laws 1857, p. 315—5 acres; Virginia Female Seminary of Providence Presbyterian Church, Pr. Laws 1857, p. 843—20 acres; Hamilton College, Pr. Laws 1857, p. 889, 40 acres; Henry Female Seminary, Pr. Laws 1857, p. 1063—5 acres; McHenry Institute, Pr. Laws 1857, p. 1374—20 acres; Nashville Male & Female Seminary, Pr. Laws 1859, p. 370—10 acres; Decatur Seminary, Pr. Laws 1861, p. 13—10 acres; Illinois Female College, Pr. Laws 1863, p. 18—5 acres;

D. Some other institutions had restrictions in their legislative charters which provided that they would have a tax exemption on their property so long as it was owned and occupied by said college or institution for school or institutional purposes. Quincy College, for an example, had a tax exemption which was restricted to real estate which was actually used for educational purposes provided that not more than 5 acres of land should be exempt, Pr. Laws 1869, Vol. 1, p. 26. Similar such provisions are contained in the charters of the following institutions or colleges:

Marshall College, Pr. Laws 1857, p. 831; Illinois Female College, Pr. Laws 1863, p. 18; Grand Prairie Seminary and Commercial College, Pr. Laws 1865, Vol. 1, p. 23; Simpson Seminary and Collegiate Institute, Pr. Laws 1867, Vol. 1, p. 10; Evangelical Lutheran Synod of Missouri, Ohio and other states, Pr. Laws 1867, Vol. 1, p. 242; Women's Hospital of Quincy, Pr. Laws 1867, Vol. 2, p. 77; The Library Hall Company of Quincy, Pr. Laws 1867, Vol. 3, p. 246; The Havana German School Association, Pr. Laws 1867, Vol. 3, p. 37; Elmira College of Greenville, Bond County, Illinois, Pr. Laws 1869, Vol. 1, p. 36.

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1707

THE COUNTY OF COOK, A BODY POLITIC AND CORPORATE, AND THE COUNTY COLLECTOR OF COOK COUNTY,
Petitioners,

vs.

NORTHWESTERN UNIVERSITY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner herein seeks issuance of a writ of certiorari to review a unanimous decision of the Supreme Court of Illinois (opinion by Justice Schaefer) holding that Northwestern University's Charter, one provision of which exempts property owned by Northwestern from property tax, does not violate the Fourteenth Amendment.[1] Respondent Northwestern University, opposes issuance of a writ of certiorari to review the decision of the Supreme Court of Illinois. The question sought to be presented is not substantial and, in any event, was decided by the Supreme Court of Illinois in a way which is clearly "in accord with

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[1] A copy of the Charter as amended is attached hereto as Appendix A. The decision of the Supreme Court of Illinois appears as Appendix B to the Petition for Writ of Certiorari; citations herein to that decision are to pages in Appendix B of the Petition.

applicable decisions of this court." Rule 19(1)(a) of this Court's Rules. See, e.g., *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 (1970).

QUESTION PRESENTED

The question sought to be presented is whether Northwestern's Charter exemption from property taxation violates the Fourteenth Amendment by depriving other non-chartered educational institutions of equal protection of the laws or by depriving non-exempt taxpayers of their property without due process of law.

STATEMENT OF THE CASE

Northwestern University received its Charter from the State of Illinois in 1851. The Charter provides that the University's Trustees shall hold its property "solely for the purposes of education, and not as a stock for the individual benefit of themselves or any contributor to the endowment of the same." (App. A, *infra*, p. A-2) It further provides that the University shall have the power to lease its real estate (*id.*, p. A-3):

> "... to grant, bargain, sell, convey, devise, let, place out at interest, or otherwise dispose of the same for the use of said institution in such manner as to them shall seem most beneficial to said institution."

The proceeds derived from leases, like other assets of the University, are to be devoted solely to its enumerated educational purposes (*id.*, p. A-3):

> "Said corporation shall faithfully apply all the funds collected or the proceeds of the property belonging to the said institution, according to their best judgment, in erecting and completing suitable buildings, supporting necessary officers, instructors, and servants, and procuring books, maps,

> charts, globes, and philosophical, chemical, and other apparatus necessary to the success of the institution, and do all other acts usually performed by similar institutions, that may be deemed necessary or useful to the success of said institution, under the restrictions herein imposed."

The Charter also provides that Northwestern "shall not be allowed to hold more than two thousand acres of land at any one time, unless the said corporation shall have received the same by gift, grant or devise", with an additional provision that in the event gifts result in total land holdings of over two thousand acres the University is required to sell the excess within ten years. (*Id.*)[2]

The Charter was amended by the Illinois legislature in 1855 by addition of the following provision: "That all property, of whatever kind or description belonging to, or owned by said Corporation shall be forever free from taxation for any and all purposes." (*Id.*, p. A-6) Later in that same year, the University opened and enrolled its first students.

Northwestern's Charter was granted pursuant to Article 9, Section 3 of the Illinois State Constitution of 1848, which permitted grants of tax exemption applicable to all property owned by the chartered institution, including property leased to provide revenues to carry out the institutional purpose. In 1848, Illinois was an economically undeveloped State, with a large debt and insufficient tax revenues to establish and maintain educational institutions. The State met this problem by incorporating a number of private schools, which were authorized to own and lease property and to use the proceeds to support their educational pro-

[2] The University's land holdings have never approached the ceiling of 2,000 acres. Northwestern, in the early years of its history, owned approximately 680 acres of land in Cook County. It owns only 434 acres today, of which only 71 acres are leased to provide revenues for educational purposes.

grams. An integral part of this approach was the pe
manent exemption from taxation accorded those school
which served the same function as an endowment of prop
erty producing annual revenues. At every session of th
Illinois legislature between 1848 and 1870, charters wer
enacted creating educational institutions throughout th
State with full exemption from taxation for property hel
by them.[3]

By 1870, the situation had changed. The change wa
aptly described by the Supreme Court of Illinois in it
opinion as follows (Petition, App. B, pp. 40-41):

> "Prior to the adoption of the constitution of 1870, a large number of corporate charters had been granted by the legislature to private educational institutions. There were more than 80 such charters which contained some provision for tax exemption. Only a relatively small number of these institutions have survived. . . . The purpose of the tax exemptions was, of course, to bring about the donation of money or property to the institutions.
>
> "With the adoption of the constitution of 1870 the situation changed dramatically. That constitution prohibited the legislature from granting to any corporation any special privilege (art. IV. sec.

[3] Cook County in its Petition for Writ of Certiorari erroneousl
asserts that Northwestern received its Charter pursuant to an ac
passed by the General Assembly in 1849, entitled "an Act to Inco
porate Institutions of Higher Learning in Illinois." (Petition, pp
6-7.) The 1849 Act applied only to institutions of learning inco
porated *without* a special charter from the legislature by filing
certificate containing certain information with the Secretary o
State and the recorder of the county in which the institution was t
be established. Northwestern University was not incorporated unde
the provisions of the 1849 Act (it did not follow the procedures se
forth in the 1849 Act, nor was it subject to the acreage limitation
contained in that Act). Northwestern, instead, was granted a spe
cial charter from the legislature, which was effective of its ow
force.

> 22), and with respect to exemption from taxation provided that such 'property as may be used exclusively for * * * school * * * purposes, may be exempted from taxation; but such exemption shall be only by general law.' (Art. IX, sec. 3.) And by general law the legislature exempted only that property of schools which was used exclusively for school purposes, and not leased or otherwise used with a view to profit.
>
> "Educational institutions established subsequent to 1870 therefore do not enjoy the same kind of tax exemption that is enjoyed by Northwestern University."

Following adoption of the constitution of 1870 and enactment of a statute granting exemption only with respect to property used for school purposes, Cook County levied taxes on certain properties owned and leased by Northwestern. Northwestern objected to the taxes on the ground that its property was exempt from taxation under its Charter. The case reached this Court which ruled, in *University* v. *People*, 99 U.S. 309 (1878), that the Charter was a binding contract protected by the obligation of contracts clause (99 U.S. at 322). This Court specifically ruled that the 1848 Illinois State Constitution (Article 9, Section 3), which granted to the General Assembly power to exempt from taxation "such property as they might deem necessary for school purposes", was broad enough to permit exemption of property which was leased and the revenues used for school purposes (99 U.S. at 324):

> "The purpose of a college or university is to give youth an education. The money which comes from the sale or rent of land dedicated to that object aids this purpose. Land so held and leased is held for school purposes, in the fullest and clearest sense."

Accordingly, this Court held that the Illinois General Assembly was authorized by the Constitution of 1848 to grant the Charter, and that the Charter was a valid contract protected by the obligation of contracts clause. As a result of this decision and two subsequent decisions by the Illinois Supreme Court, *In re Northwestern University*, 206 Ill. 64 (1903), and *Northwestern University* v. *Hanberg*, 237 Ill. 185 (1908), property owned by Northwestern has not been subject to taxation.

One of the properties owned by Northwestern is the Dee-El Garage, a parking garage, located at 21-29 West Monroe Street, on the south side of Monroe Street midway between State and Dearborn Streets, in Chicago. Since 1951 the garage has been leased and operated by Dee-El Garage, Inc., which has paid annual rentals to Northwestern. These revenues have been used by Northwestern solely for the educational purposes set forth in its Charter.

For the tax year 1967, the County Assessor of Cook County assessed the Dee-El Garage at an amount, after equalization, of $180,484; and on the basis of this assessment, the County Clerk extended taxes in the amount of two installments of $5,219.60 each.[4] The County Collector then issued a tax bill for the amount of such taxes, and, when the taxes were not paid, applied for judgment and order of sale against the property. Northwestern University, as owner of the property, filed its objections in the Circuit Court of Cook County to the 1967 taxes, relying upon its Charter tax exemption.

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[4] More is involved in this case than annual taxes of $10,000 on Dee-El Garage. It is estimated that the financial burden which would be placed directly upon Northwestern by a declaration that the Charter exemption is void with respect to leased properties such as the Dee-El Garage would have the same effect as taking from Northwestern approximately $28,600,000 in endowment funds providing annual income of $1,200,000. This is the equivalent of 480 full tuition scholarships.

On February 3, 1971, the circuit court entered judgment declaring Northwestern's Charter exemption invalid as applied to the Dee-El Garage property, relying upon the Fourteenth Amendment. This decision was unanimously reversed by the Supreme Court of Illinois in its decision dated March 30, 1972, which petitioner asks this Court to review.

ARGUMENT

Northwestern's Charter Exemption Does Not Violate the Fourteenth Amendment.

Cook County contends that Northwestern's Charter exemption from taxation, which was concededly constitutional at the time it was enacted, was invalidated by virtue of the enactment of the Fourteenth Amendment. (Petition, pp. 15, *et seq.*) To support this argument, Cook County cites various authority for the proposition that acts of a state legislature (i.e., the Charter) and the Constitution itself (i.e., the obligation of contracts clause) may be superseded by subsequent amendments to the United States Constitution. (*Id.*, pp. 16-21, 26-29.) However, Cook County simply assumes as its premise that the Fourteenth Amendment would (if applicable) invalidate Northwestern's Charter exemption, and then proceeds at length in its attempt to show that the Fourteenth Amendment is applicable. Cook County thus seeks to divert attention from the total absence of support for its premise that the Charter exemption is inconsistent with either the equal protection clause or the due process clause of the Fourteenth Amendment.

It is well established that the equal protection clause does not preclude differences in legislative treatment but only those which are arbitrary. *Dandridge* v. *Williams*, 397 U.S. 471, 484-487 (1970); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955); *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U.S. 580, 586 (1935).

Cook County contends that the equal protection clause is violated because Northwestern and other schools chartered prior to 1870 have broader tax exemptions by virtue of their charters than do schools established under general law subsequent to 1870 by virtue of the general tax exemption statute.[5] However, Northwestern and the other pre-1870 schools which have charter exemptions are in a wholly different position than schools created after 1870 without charters, at a time when the state's constitution, its policy regarding exemptions, and its ability to support higher education directly had all changed. On this point, the Supreme Court of Illinois correctly held as follows (Petition, App. B, pp. 41-42):

> "In our opinion Northwestern's charter tax exemption does not, as the trial court held, violate the equal-protection clause of the fourteenth amendment by arbitrarily discriminating against other educational institutions whose exemptions from taxation are not so broad. The contract with the State affords a rational, indeed, a constitutionally required, distinction between the university and other institutions. The different tax exemption accorded institutions organized after the adoption of the Constitution of 1870 does not alter the situation. . . . 'Just as a State may provide that after a specified date newly established common carriers must obtain state approval before entering into business so as to prevent proliferation of such carriers and excessive use of the State's highways, see

[5] Since Cook County's theory is that colleges founded after 1870 are being unreasonably discriminated against, the consequence of that theory, if it had any merit (which it does not), would be that the "discriminatory" tax laws applied to the post-1870 schools would have to be invalidated—not that the obligation of Northwestern's Charter should be impaired.

It is noteworthy that the supposed victims of discrimination—colleges and universities created after 1870—have not asserted that they are injured by virtue of the existence of the pre-1870 charters.

> *Stanley* v. *Public Utilities Comm'n* [295 U.S. 76, 79 L.Ed. 1311, 55 S.Ct. 628 (1935)], similarly Congress does not exceed its power to tax nor does it violate the Fifth Amendment when it refuses to exempt from tax newly formed corporations, the multiplication of which might burden otherwise valid federal programs.' *United States* v. *Maryland Savings-Share Insurance Corp.* (1970), 400 U.S. 4, 6-7, 27 L.Ed.2d 4, 7-8, 91 S.Ct. 16. See also *Dandridge* v. *Williams* (1970), 397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153."

The decision of the Illinois Supreme Court is fully in accord with the applicable decisions of this Court. In *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 (1970), expressly relied upon by the Illinois Supreme Court (though nowhere mentioned in Cook County's Petition), this Court dealt with a case in which insurers of accounts of shareholders of savings and loan institutions were exempt from taxation if organized before September 1, 1957. Maryland Savings-Share Insurance Corp., established by the Maryland legislature in 1962, claimed that denial to it of tax-exempt status based on the date of its organization was an arbitrary and unconstitutional discrimination. This Court held that different tax treatment for post-1957 corporations was not unconstitutional (400 U.S. at 6):

> "The fact that Congress enacts a statute containing a 'grandfather clause,' which exempts from the general income tax certain corporations organized prior to a specified date, does not of itself indicate that Congress has made an arbitrary classification. Cf. *Stanley* v. *Public Utilities Comm'n*, 295 U.S. 76 (1935); *Sperry & Hutchinson Co.* v. *Rhodes*, 220 U.S. 502 (1911); *Watson* v. *Maryland*, 218 U.S. 173 (1910); *Sampere* v. *New Orleans*, 166 La. 776, 117 So. 827 (1928), *aff'd per curiam*, 279 U.S. 812 (1929). Normally, a legislative classification will

> not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts."

This Court's decision in *Maryland Savings-Share Insurance Corp.* is completely dispositive of the present case. The holding that it is not "an arbitrary classification" to grant an exemption to one corporation but no exemption to another based on different dates of incorporation applies *a fortiori* to sustain the granting of an exemption to one university, and a partial exemption to other universities, depending on whether they were chartered before or after 1870.

In *Stanley* v. *Public Utilities Comm'n*, 295 U.S. 76 (1935), this Court had before it a state statute regulating truckers which exempted from the certification requirement carriers which had provided service prior to a specified date. A carrier which did not meet this requirement challenged the exemption as contrary to the equal protection clause. This Court upheld the exemption of the earlier-established carrier as based upon a rational classification and, thus, not a violation of the Fourteenth Amendment. See also *Southeastern Express Co.* v. *Robertson*, 264 U.S. 535 (1924).

Cook County does not analyze these decisions in its Petition, but instead simply concludes that they "are not applicable," arguing that Northwestern's Charter is not protected by the obligation of contracts clause (Petition, p. 29):

> "From the inception of such a contract every right granted thereunder is subject to the defeasance or limitation compelled by a subsequent amendment to the Federal Constitution. Thus, Northwestern had no 'vested' rights at the time the 14th Amendment was adopted comparable to those affording the basis of the 'grandfather clause' decisions."

This argument makes no sense. For one thing, the "grandfather clause" decisions relied upon by the Illinois Supreme Court stand for the proposition that exemptions or regulations may treat differently the corporations subject thereto, based upon the date of the organization of the subject corporations; and this is so whether or not the exemptions or regulations deal with "vested" contract rights. The insurers subject to the tax exemption in *Maryland Savings-Share Insurance Corp.* did not have a "vested" right to an exemption; the point was that a difference in legislative treatment based on the date when the insurers were established was not an arbitrary classification.

In addition, Cook County's argument that Northwestern's rights under its Charter are "subject to defeasance" is frivolous. This argument is based on an obvious misconstruction of a provision of Section 1 of the Charter authorizing the Trustees to make and alter by-laws:

> ". . . [the 'Trustees of the Northwestern University'] henceforth shall be styled and known by that name, and by that name and style to remain and have perpetual succession, with power to sue and be sued, plead and be impleaded, to acquire, hold and convey property, real, personal, or mixed, in all lawful ways, to have and use a common seal, and to alter the same at pleasure, *to make and alter from time to time such by-laws as they may deem necessary for the government of said institution, its officers and servants, provided such by-laws are not inconsistent with the constitution and laws of this State and of the United States,* and to confer on such persons as may be considered worthy of such academical or honorary degrees as are usually conferred by similar institutions." (Emphasis supplied.)

Cook County argues that this provision of the Charter means that the entire Charter was subject to the Constitu-

tion, including future amendments thereto; that when the Fourteenth Amendment was enacted, it thus superseded any inconsistent provisions of the Charter; that the tax exemption provision of the Charter is inconsistent with the Fourteenth Amendment; and that therefore, *as a matter of contract*, the tax exemption provision was nullified at the time the Fourteenth Amendment became law. (Petition, pp. 13-15.) By this kind of reasoning, Cook County seeks to make the protection afforded by the Charter disappear.

However, the purpose of the quoted provisions of Section 1 of the Charter was to permit the Trustees to make *by-laws* "necessary for the government of said institution, its officers and servants," and to make certain that such *by-laws* as might be adopted would not contravene "the constitution and laws of this State and of the United States." In other words, Northwestern was to be governed subject to the law—just like other institutions. There was no purpose to make the Charter itself subject to repeal or nullification in the event of subsequent amendments to the United States Constitution. The Illinois Supreme Court properly rejected Cook County's contention as follows (Petition, App. B, p. 39):

> "[This contention is] an effort to read into the charter itself some self-defeating ingredient, and thereby to escape the impact of the clause of the Federal constitution which prohibits the impairment of contracts. It is clear that [this] contention which refers to the bylaws of the corporation, has nothing to do with the validity of the tax exemption."

The construction by the Illinois Supreme Court of the Charter granted by the Illinois legislature is clearly correct. In any event, the state court's construction of the state Charter raises no federal question at all, much less a "federal

question of substance" justifying review on writ of certiorari. Rule 19(1)(a) of this Court's Rules.

Cook County also contends that the principle of the "grandfather clause" decisions is not applicable because all of the institutions granted special charters prior to 1870 do not "enjoy identical tax exemption privileges." (Petition, p. 30). The Supreme Court of Illinois, in describing the historical context in which special charters were granted, explained the differences in charter terms as follows (Petition, App. B, p. 40):

> "The charters contained tax exemptions, the terms of which varied, apparently in accordance with the inducement thought necessary to bring about contributions to establish and maintain the institutions."

Cook County's claim essentially is that the state is prohibited by the equal protection clause from making contracts with different parties except on identical terms.[6] However, the Fourteenth Amendment has never been construed as requiring that once a state has made a contract for services on certain terms, it can never constitutionally make a contract with any other party for the same kind of services except on identical terms. Such a construction of the equal protection clause would make it virtually impossible for the states to do business.

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[6] Cook County cites *Chicago Theological Seminary* v. *Illinois*, 188 U.S. 662 (1903), to show that the terms of the pre-1870 charters were not all identical. This Court, in that case, ruled that the charter granted to Chicago Theological Seminary did not extend tax exemption to property other than that "used in immediate connection with the seminary." This Court reaffirmed its decision sustaining Northwestern's Charter in *University* v. *People*, 99 U.S. 309 (1878), and specifically distinguished the Northwestern Charter from that of the seminary, terming the difference between the two charters "intrinsic and material." (188 U.S. at 675.)

Finally, Cook County argued before the Illinois Supreme Court below, and apparently seeks to argue here (Petition, pp. 12, 21), that Northwestern's Charter exemption violates the due process clause of the Fourteenth Amendment because the exemption for Northwestern results in increased taxes for non-exempt taxpayers. No authority was, or is now, cited in support of this argument; and the Illinois Supreme Court rejected it, observing that (Petition, App. B, p. 42):

> "This proposition, if accepted, would invalidate all exemptions, for all of them, to a greater or lesser degree, transfer the burden of taxation to others."

The Illinois Supreme Court was clearly correct. *Cf. Bell's Gap Railroad Co.* v. *Pennsylvania,* 134 U.S. 232, 237 (1890).

CONCLUSION

For the foregoing reasons, Cook County's Petition for Writ of Certiorari does not present any substantial question for decision by this Court and, accordingly, should be denied.

Respectively submitted,

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July, 1972

APPENDIX A

An Act to Incorporate the Northwestern University

SEC. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That Richard Haney, Philo Judson, S. P. Keys, and A. E. Phelps, and such persons as shall be appointed by the Rock River Annual Conference of the Methodist Episcopal Church to succeed them in said office; Henry Summers, Elihu Springer, David Brooks, and Elmore Yocum, and such persons as shall be appointed by the Wisconsin Annual Conference of said church to succeed them; four individuals, if chosen, and such persons as shall be appointed to succeed them by the Michigan Annual Conference of said church; four individuals, if chosen, and such persons as shall be appointed to succeed them by the North Indiana Annual Conference of said church; H. W. Reed, I. I. Steward, D. N. Smith, and George M. Geas, and such persons as shall be appointed to succeed them by the Iowa Annual Conference of said church: four individuals, if chosen, and such persons as shall be appointed to succeed them by the Illinois Annual Conference of said church; A. S. Sherman, Grant Goodrich, Andrew J. Brown, John Evans, Orrington Lunt, J. K. Botsford, Joseph Kitterstring, George F. Foster, Eri Reynolds, John M. Arnold, Absalom Funk, and E. B. Kingsley, and such persons, citizens of Chicago or its vicinity, as shall be appointed by the Board of Trustees hereby constituted to succeed them, be, and they are hereby, created and constituted a body politic and corporate, under the name and style of the "Trustees of the Northwestern University," and henceforth shall be styled and known by that name, and by that name and style to remain and have perpetual succession, with power to sue and be sued, plead and be impleaded, to acquire, hold and convey property, real, personal, or mixed, in all lawful ways, to have and use a common seal,

and to alter the same at pleasure, to make and alter from time to time such by-laws as they may deem necessary for the government of said institution, its officers and servants, provided such by-laws are not inconsistent with the constitution and laws of this State and of the United States, and to confer on such persons as may be considered worthy of such academical or honorary degrees as are usually conferred by similar institutions.

SEC. 2. The term of office of said Trustees shall be four years, but that of one member of the Board for each conference enjoying the appointing power by this act, and term of three of the members whose successors are to be appointed by the Board hereby constituted, shall expire annually, the term of each member of the Board herein named to be fixed by lot at the first meeting of said Board, which Board shall, in manner above specified, have perpetual succession, and shall hold the property of said institution solely for the purposes of education, and not as a stock for the individual benefit of themselves or any contributor to the endowment of the same; and no particular religious faith shall be required of those who become students of the institution. Nine members shall constitute a quorum for the transaction of any business of the Board, except the appointment of President or Professor, or the establishment of chairs in said institution, and the enactment of by-laws for its government, for which the presence of a majority of the Board shall be necessary.

SEC. 3. Said Annual conferences of the Methodist Episcopal Church, under whose control and patronage said university is placed, shall each also have the right to appoint annually two suitable persons, members of their own body, visitors to said university, who shall attend the examination of students, and be entitled to participate in the deliberations of the Board of Trustees and enjoy all the privileges of members of said board except the right to vote.

SEC. 4. Said institution shall remain located in or near the City of Chicago, Cook County, and the corporators and their successors shall be competent in law or equity to take to themselves, in their said corporate name, real, personal, or mixed estate, by gift, grant, bargain and sale, conveyance, will, devise or bequest of any person or persons whomsoever and the same estate, whether real, personal, or mixed to grant, bargain, sell, convey, devise, let, place out at interest, or otherwise dispose of the same for the use of said institution in such manner as to them shall seem most beneficial to said institution. Said corporation shall faithfully apply all the funds collected or the proceeds of the property belonging to the said institution, according to their best judgment, in erecting and completing suitable buildings, supporting necessary officers, instructors and servants, and procuring books, maps, charts, globes, and philosophical, chemical, and other apparatus necessary to the success of the institution, and do all other acts usually performed by similar institutions, that may be deemed necessary or useful to the success of said institution, under the restrictions herein imposed: Provided, nevertheless, that in case any donation, devise, or bequest shall be made for particular purposes accordant with the design of the institution, and the corporation shall accept the same, every such donation, devise, or bequest shall be applied in conformity with the express conditions of the donor or devisor: Provided further, that said corporation shall not be allowed to hold more than two thousand acres of land at any one time unless the said corporation shall have received the same by gift, grant, or devise; and in such case they shall be required to sell or dispose of the same within ten years from the time they shall acquire such title; and on failure to do so, such land over and above the beforenamed two thousand acres, shall revert to the original donor, grantor, devisor, or their heirs.

SEC. 5. The treasurer of the institution and all other agents when required, before entering upon the duties of their appointment, shall give bond for the security of the corporation in such penal sums, and with such securities as the corporation shall approve, and all process against the corporation shall be by summons, and the service of the same shall be by leaving an attested copy thereof with the treasurer at least sixty days before the return day thereof.

SEC. 6. The corporation shall have power to employ and appoint a President or Principal for said institution, and all such professors or teachers, and all such servants as may be necessary, and shall have power to displace any or such of them, as the interest of the institution may require, to fill vacancies which may happen, by death, resignation, or otherwise, among said officers and servants, and to prescribe and direct the course of studies to be pursued in said institution.

SEC. 7. The corporation shall have power to establish departments for the study of any and all the learned and liberal professions in the same; to confer the degree of doctor in the learned arts and sciences and *belles-lettres,* and to confer such other academical degrees as are usually conferred by the most learned institutions.

SEC. 8. Said corporation shall have power to institute a board of competent persons, always including the faculty, who shall examine such individuals as may apply, and if such applicants are found to possess such knowledge pursued in said institution, as in the judgment of said board renders them worthy, they may be considered graduates in course, and shall be entitled to diplomas accordingly on paying such fee as the corporation shall affix, which fee, however, shall in no case exceed the tuition bills of the full course of studies in said institution; said examination board

may not exceed the number of ten, three of whom may transact business, provided one be of the faculty.

SEC. 9. Should the corporation at any time act contrary to the provisions of this charter, or fail to comply with the same, upon complaint being made to the Circuit Court of Cook County, a *scire facias* shall issue, and the circuit attorney shall prosecute in behalf of the People of this State for forfeiture of this charter.

This act shall be a public act, and shall be construed liberally in all courts, for the purposes herein expressed.

FIRST AMENDMENT

An Act to Amend an Act Entitled "An Act To Incorporate the Northwestern University" Approved January 28, 1851

SEC. 1. Be it enacted by the people of the State of Illinois represented in the General Assembly: That John L. Smith, Aaron Wood, Luther Taylor, and William Graham and such persons as shall be elected to succeed them by the Northwestern Indiana Conference of the Methodist Episcopal Church, be, and they are hereby constituted Members of the Board of Trustees of the Northwestern University.

SEC. 2. No spirituous, vinous or fermented liquors shall be sold under license, or otherwise within four miles of the location of said University, except for Medicinal, Mechanical, or Sacramental purposes, under a penalty of twenty-five dollars for each offense, to be recovered before any Justice of the Peace of said County in an action of debt, in the name of the County of Cook, *Provided* that so much of this Act as relates to the sale of intoxicating drink within four miles may be repealed by the General Assembly whenever they may think proper.

SEC. 3. The said Corporation shall have power to take, hold, use and manage, lease and dispose of all such property as may in any manner come to said Corporation charged with any trust, or trusts, in conformity with trusts, and direction, and so execute all such trusts as may be confided to it.

SEC. 4. That all property of whatever kind or description belonging to, or owned by said Corporation shall be forever free from taxation for any and all purposes.

SEC. 5. This Act shall be a public Act, and take effect from and after its passage.